IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1104 OF 2003

Shri Ashok Kashinath Bhoir
Aged years, Occ: Labourer,
R.at-Nandithane Pada,
Post Mhapoli, Tal.Bhiwandi,
District -Thane.
(Presently in Kolhapur Jail) ..Appellant.
(Orig.Accused)

V/s.

State of Maharashra.
(through Ganeshpuri Police
Station, Bhiwandi) ..Respondent.

Mr.Manoj Bhatt for Appellant.

Mr.Y.S.Shinde, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 25, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the III Ad-hoc Addl. Sessions Judge, Thane dated November 29, 2002 in Session Case No.188 of 2002. The appellant was chargesheeted and tried for offence punishable under section 302 of the I.P.Code on the allegation that he committed murder of his younger brother Vilas. The incident in question took place after altercation commenced between two brothers in their house. Both the brothers were under influence of alcohol at the

relevant time. The deceased Vilas who was the youngest among them took up quarrel with the appellant-elder brother on the issue that the appellant was not taking initiative in getting him married. The verbal debate escalated in the appellant using stick lying in the house to hit the deceased victim, while he was about to leave his house, on his back. Only one stick blow was given by the appellant. The victim on receiving that blow fell down. It is the prosecution case that Vilas succumbed to the said injury. Medical evidence does indicate that the deceased had suffered about 11 injuries. Most of them are abrasion and contusion which were inflicted during the altercation between the brothers and after he fell down on the ground on receiving stick blow. Injury No.10 has been held to be fatal, which is described by the doctor as contusion 6" X 1-1/2" over right lumber back. Corresponding internal injury on account of said blow is described in column No.21 of the Post Mortem report as "Peritoneam ruptered". Relying on the medical evidence, the Court below has found that death of Vilas was homicidal death. In this appeal the finding recorded by the Court below that the appellant assaulted deceased Vilas and death of Vilas was homicidal death as reached by the court below is

not challenged.

2. The trial Court then proceeded to examine whether the case on hand was one of culpable homicide amounting to murder or otherwise. The trial Court from paragraph-21 to 29 of the impugned Judgment has addressed itself with this aspect and has found that the material on record would clearly establish that the case was not governed by provisions of section 302 of I.P.Code as such, but under section 304(II) of I.P.Code. The State has not challenged the view so taken by the trial Court. In that sense, this Court will have to proceed on the basis that the offence established against the appellant/accused is under section 304(II) of I.P.Code. Even if the State had challenged the finding reached by the trial Court on this issue, I have no hesitation in taking the view that there is no infirmity either in the approach or conclusion reached by the trial Court while dealing with the said issue. The reasons so recorded by the trial court are founded on well established position of law. The trial Court has also adverted to the relevant facts for recording the finding that the case was governed by provisions of section 304(II) of I.P.Code. The trial Court has noted that the incident in question occurred between the appellant and the victim in the house under the influence of

liquor. It was sudden quarrel between the brothers. That Vilas was agitated about non-performance of his marriage by the appellant. That issue was hotly debated, which ended in physical fight between the two brothers, in which the appellant is alleged to have assaulted the deceased victim. Amongst the injuries noticed on the person of deceased-Vilas, only one injury is said to be fatal. It has also come in the evidence as deposed by the mother of the appellant that deceased Vilas used to take drinks and quarrel with the appellant under influence of liquor on regular basis. It has also come in the evidence of the mother that deceased Vilas had serious ailment related to appendix. Suffice it to observe that the conclusion reached by the trial Court that the injury caused by the appellant was not intended to kill the victim and was also not pre-planned assault by the appellant on the victim. That finding will have to be upheld.

3. The only question that remains to be considered is the quantum of sentence. Indeed, the trial Court has considered this aspect in paragraph-31 of the impugned Judgment. The trial Court has noted that the offence in question was a serious offence, one of murder of own brother. In

such situation, it is not possible to take lenient view, for which sentence has been awarded to the extent of rigorous imprisonment for seven years and to pay fine of Rs.1000/- in default to suffer further simple imprisonment for three months. On behalf of the appellant it was argued before the lower Court that the appellant was the only earning member of the family and was having two children. Besides, he had to look after his aged mother. This argument however, did not find favour with the lower Court.

4. In my opinion, though the appellant is responsible for the death of his brother, but the circumstances in which Vilas succumbed to injury are equally relevant. The death of brother though unfortunate was never intended by the appellant. The appellant gave one stick blow on the back of Vilas on account of grave and sudden provocation. The appellant was not responsible for such provocation. Besides, the fight erupted between the brothers when both were under influence of liquor. Even the trial Court while considering the issue of nature of offence has recorded that finding. I find substance in the argument of the appellant that the appellant already has suffered substantial part of the sentence and as the death of his brother was caused in

peculiar circumstances and unintended one; coupled with the fact that he has the responsibility of his two children and aged mother, to be looked after and that it is evident that the appellant belongs to lower strata of society, and that even though this Court had released him on bail as back as in September, 2003 he has not been able to avail of that bail. Taking over all view of the matter, in my opinion, there are extenuating circumstances, which persuade me to reduce the quantum of sentence.

5. According to the appellant he was taken into custody on 30th September, 2001. The appellant was convicted by the trial Court by the impugned Judgment on 29th November, 2002. The learned APP however, points out that the appellant had availed bail during the trial for period between 20th December, 2001 to 29th November, 2002. The counsel for the appellant however, submits that assuming that the appellant has availed bail before the trial Court, it has come on record that deceased Vilas succumbed to the injuries as the family was not able to afford the medical expenses. Besides, the appellant has already earned remission while in jail undergoing present sentence. Moreover, the appellant comes from socially and economically backward community. Taking overall view

of the matter, quantum of sentence imposed by the trial Court is reduced to five years in the peculiar facts of the present case. This appeal would succeed only to this limited extent.

6. Accordingly, this appeal is partly allowed. While upholding the order of conviction under section 304(II) of I.P.Code passed by the trial Court, the order of sentence, however, is modified to the effect that the appellant shall suffer rigorous imprisonment for five years and to pay fine of Rs.1000/-. In default of payment of fine, he shall suffer simple imprisonment for one month. The appellant will be entitled to set off. Rest of the order passed by the trial Court will remain as it is. Ordered accordingly.